The Commonwealth of Massachusetts
Superior Court Department of the Trial Court
BARNSTABLE COUNTY
P.O. BOX 425
3195 Main Street
Barnstable, Massachusetts 02630
(508) 375-6684

SCOTT W. NICKERSON
CLERK-MAGISTRATE

THOMAS J. PERRINO
FIRST ASSISTANT CLERK MAGISTRATE

SCOTT D. COLGAN
ASSISTANT CLERK MAGISTRATE

CHRISTINE M. HIGGINBOTHAM
ASSISTANT CLERK MAGISTRATE

April 17, 2019

Sharon J. Thibeault
Assistant District Attorney
Cape and Islands District
3231 Main Street
Barnstable, MA 02630

Edward B. Fogarty, Esquire
1380 Main St, Suite 410A
Springfield, MA 01103

Dear Counsel,

Attached please find a copy of "Suffolk County District Attorney's Office's Motion to Quash". Judge Cannone would like a response no later than April 22, 2019, otherwise a hearing will be required. The Judge has sealed a one page document referred to by said motion which may be reviewed after a Protective Order is executed. Please inform this office as to the intention of counsel on this issue.

Very truly yours,

Scott D. Colgan,
Assistant Clerk-Magistrate

SDC/arg
Enclosures (1)

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, ss.

SUPERIOR COURT DEPARTMENT
No. 1572CR00128

COMMONWEALTH

v.

KEVEN SEME

SUFFOLK COUNTY DISTRICT ATTORNEY'S OFFICE'S MOTION TO QUASH

The Suffolk County District Attorney's Office ("the District Attorney") respectfully moves to quash the "Summons for Presumptively Privileged Records," ("the summons") issued to the District Attorney on March 15, 2019, by this Court (Cannone, J.), pursuant to Mass. R. Crim. P. 17(a)(2). The summons commands the production of the entirety of the District Attorney's investigatory file into a September 30, 2015, homicide ("the investigatory file"). The summons lacks an adequate legal foundation and is overly broad. Moreover, the District Attorney is absolutely privileged to withhold the entire investigatory file into this as-yet uncharged homicide, any potential future criminal defendant's fair trial right would be irretrievably prejudiced by disclosure of the investigatory file, and particular portions of the investigatory file are protected from disclosure by other privileges and statutes. Accordingly, this Court should quash the summons.

BACKGROUND

A. The Homicide of Jeffrey Randall.

On September 30, 2015, Jeffrey Randall ("Randall") was found dead in the Hyde Park neighborhood in Boston. A medical examiner concluded that the cause of death was homicide.

B. The Summons To The District Attorney.

In mid-March, 2019, the District Attorney was served with the summons which commands production, by April 17, 2019, of:

> RECORDS OF THE SUFFOLK COUNTY DISTRICT ATTORNEY, 1 Bulfinch Pl, Boston, MA 02114 regarding ANY NOTES OR RECORDS OF LUTHERSON J. BONHEUR, DOB 3/14/1992 AND THE DEATH/HOMICIDE ON OR ABOUT SEPTEMBER 30, 2015, OF JEFFREY RANDALL. Such records for the time period September 30, 2015 to present.

(Add.3).[1] The justification for this request, as described in the summons, is that:

> Lutherson Bonheur is a central Commonwealth witness in the case against Defendant [Keven Seme]. Upon information and belief, Mr. Bonheur was a central suspect in the homicide of Jeffrey Randall. Mr. Bonheur is also the subject of a federal indictment for drug-related crimes. Mr. Bonheur has received substantial consideration for his cooperation in the case against the Defendant [Seme]. Mr. Bonheur may have received the same consideration in the investigation of the homicide of Mr. Jeffrey Randall.

(*infra* at p. 3).

C. The District Attorney's Production.

On or about April 17, 2019, the District Attorney produced to this Court a one-page document that is potentially responsive to the request for any "consideration in the investigation of the homicide of Mr. Jeffrey Randall" that has been provided by the District Attorney to Lutherson Bonheur ("Bonheur") (Add.3). Pursuant to the notice accompanying the summons, this one-page document was produced in an envelope marked "PRIVILEGED RECORDS: IMPOUNDED". If this Court ultimately provides this document to the parties in the instant action, the District Attorney moves the Court to issue a protective order to restrict dissemination of the document.[2]

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[1] References to the District Attorney's Addendum will be cited as (Add.[page]).

[2] The District Attorney included a motion for protective order with the production.

D. The District Attorney's Motion To Quash.

The District Attorney moves to quash the summons insofar as it commands production of any material aside from the one-page document described in § C, *supra*.

ARGUMENT

Massachusetts Rule of Criminal Procedure 17(a)(2) permits the issuance of a summons for the production of documents. Under that rule, the moving party must show: (1) that the documents sought are evidentiary and relevant; (2) that no other source likely exists for those documents; (3) that the moving party cannot adequately prepare for trial without reviewing the documents and that a trial may be unreasonably delayed in the absence of pretrial production; and (4) that the moving party is requesting the documents in good faith and not as a fishing expedition. *Commonwealth v. Dwyer*, 448 Mass. 122, 141-143 (2006) (explaining the standard set forth in *Commonwealth v. Lampron*, 441 Mass. 265 (2004)). Such a summons may be quashed or modified "if compliance would be unreasonable or oppressive". Mass. R. Crim. P. 17(a)(2).

Here, the summons commands the District Attorney to produce the entirety of its investigatory file on an uncharged homicide. Simply put, such a command is unreasonable and oppressive because it is without legal precedent.

A. The Summons Fails To Meet The Legal Requirements For Issuance Under *Dwyer*.

Preliminarily, the summons is overly broad as it lacks the requisite legal showing under *Dwyer*. At best, the only material that the defendant demonstrated was "evidentiary and relevant" was material that conceivably suggests that Bonheur could have a motive to curry favor with the government, insofar as he "received . . . consideration" relative to the District Attorney's investigation into the Randall's homicide. To the extent that any such material exists within the investigatory file, it has been produced as described in § C,

supra. Beyond this one page of material, the defendant has not demonstrated how the entirety of the investigatory file is evidentiary or relevant, that no other source exists, that he cannot prepare for trial without pretrial production, or how the request is not a fishing expedition, *see Duyer*, 448 Mass. at 141-143, beyond a conclusory statement that each of these showing has been made (Add.3).

B. The District Attorney Is Absolutely Privileged To Withhold Communications Made To It In Order To Secure Law Enforcement Under The Common Law Investigatory Privilege.

Notwithstanding the injustice to any potential future criminal defendant's fair-trial right, the District Attorney's investigatory privilege, an integral part of the common law for nearly 150 years, forecloses any attempt to obtain investigatory material.

> It is the duty of every citizen to communicate to his government any information which he has of the commission of an offence against its laws. To encourage him in performing this duty without fear of consequences, the law holds such information to be among the secrets of state, and leaves the question how far and under what circumstances the names of the informers and the channel of communication shall be suffered to be known, to the absolute discretion of the government, to be exercised according to its views of what the interests of the public require.

Worthington v. Scribner, 109 Mass. 487, 488-489 (1872). A half-century later, the Supreme Judicial Court reaffirmed the privilege established in *Worthington*:

> It is a principle of law founded upon sound public policy and arising out of the creation and establishment of constitutional government that communications made to a district attorney in order to secure the enforcement of law are privileged and confidential in the sense that they cannot be revealed at the instance of private parties in aid of actions at law.

Attorney Gen. v. Tufts, 239 Mass. 458, 490-491 (1921).

Taken together, *Worthington* and *Tufts* "not only establish a broad privilege encompassing all communications made to a prosecutor for the purpose of securing law enforcement, but also make the privilege absolute." *District Attorney v. Flatley*, 419 Mass. 507, 510 (1995); *see also* Mass. G. Evid. § 515 ("Unless otherwise required by law,

information given to governmental authorities in order to secure the enforcement of law is subject to disclosure only within the discretion of the governmental authority."). To the extent that the investigatory file contains communications made to the prosecutor for the purposes of securing law enforcement, the District Attorney is absolutely privileged to withhold those communications.[3]

C. Any Potential Future Criminal Defendant's Fair-Trial Right Would Be Jeopardized By Pretrial Disclosure Of Information About The Case.

Importantly, the disclosure of the investigatory file prior to any criminal charge would pose significant dangers to any potential future criminal defendant's right to a fair trial. In an analogous context, a court may limit public access to court records where the information disclosed "might impair a defendant's right to a fair trial." *In re Enforcement of a Subpoena*, 463 Mass. 162, 177 n.8 (2012). The disclosure of the entirety of the investigation at this point in time would work such impairment. *See Newspapers of New Eng.*, 403 Mass. at 637 (defendant's Sixth Amendment right to a fair trial is "invaded by disclosure" of investigative material while the criminal prosecution is pending); *cf.* Model Rules of Prof'l Conduct R. 3.8(f) (prohibiting a prosecutor from making "extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused" unless necessary).

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[3] As this Court has previously recognized, "the privilege is absolute at the very least when the underlying criminal case has not been tried or otherwise resolved. To allow otherwise, would be to create very serious problems in the trial of criminal cases by the District Attorneys." *Hrones v. Keeler*, 2002 Mass. Super. LEXIS 97, at *7 (Mass. Super. Ct. Apr. 23, 2002) (Connolly, J.) (reproduced *infra* at Add.5-7).

D. Analogously, The District Attorney Is Privileged To Withhold All Investigatory Material Related To An Ongoing Criminal Prosecution Under The Investigatory and Public-Policy Exemptions To The Public Records Statute.

The investigatory file is sought here via a Mass. R. Crim. P. 17(a)(2) summons, and not pursuant to a request under the public records law, G.L. c. 66, § 10. Notwithstanding that nothing in the public records law abrogates the absolute investigatory privilege established in *Worthington* and *Tufts*, the policy underlying certain exemptions to the public records law can be instructive in understanding why this summons should be quashed. G.L. c. 4, § 7, at para. 26(d) (public-policy exemption) & para. 26(f) (investigatory exemption).

The investigatory exemption applies to "investigatory materials necessarily compiled out of the public view by law enforcement or other investigatory officials the disclosure of which materials would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest." G.L. c. 4, § 7, at para. 26(f). Of the various sound policy reasons for the exemption, the most germane here is "the avoidance of premature disclosure of the Commonwealth's case prior to trial."[4] *Bougas v. Chief of Police*, 371 Mass. 59, 62 (1976). Indeed it is self-evident that the public interest in effective law enforcement would be irrevocably undercut by forcing the District Attorney to disclose details of its investigation into a murder case prior to trial (or other resolution). *See Reinstein v. Police Comm'r*, 378 Mass. 281, 290 n.18 (1979) (recognizing that "witness

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[4] Additional (and presently applicable) policy justifications for the exemption include:

> the prevention of the disclosure of confidential investigative techniques, procedures, or sources of information, the encouragement of individual citizens to come forward and speak freely with police concerning matters under investigation, and the creation of initiative that police officers might be completely candid in recording their observations, hypotheses and interim conclusions.

Bougas v. Chief of Police, 371 Mass. 59, 62 (1976)(.

statements to be used in a pending criminal proceeding" are exempted from disclosure without examining prejudice to law enforcement); *cf. WBZ-TV4 v. District Attorney*, 408 Mass. 595, 604 (1990) (nondisclosure of tape-recorded witness statement "specific to the circumstances of the ongoing criminal investigation").

The public-policy exemption applies to "inter-agency or intra-agency memoranda or letters relating to policy positions being developed by the agency." G.L. c. 4, § 7, at para. 26(d). "The preparation of and involvement in litigation by an agency . . . inherently entails the development of "policy positions" by that agency. . . . Further, the agency prosecutes a strategy for the litigation, and its "policy positions" are frequently subject to change and refinement throughout litigation." *Lafferty v. Martha's Vineyard Comm'n*, 2004 Mass. Super. LEXIS 107, at *10 (Apr. 9, 2004) (Brassard, J.) (reproduced *infra* at Add.8-15). Here, the investigatory file contains material concerning potential "policy positions" taken by the District Attorney in its prosecution of the criminal defendant, and that material is exempted from disclosure. *See id.* at *10-*11.

E. Other Material Sought By The Summons Is Prohibited From Disclosure By Privilege and Statute.

The broad request for the District Attorney's investigatory file here encompasses other protected material as well.

1. The District Attorney is privileged to withhold material protected by the Attorney-Client Privilege or Work-Product Doctrine.

To the extent that the investigatory file contains material protected by the attorney-client privilege or work-product doctrine, the District Attorney invokes those protections to withhold that material. *E.g.*, Mass. G. Evid. § 502; *Suffolk Constr. Co. v. Division of Capital Asset Mgmt.*, 449 Mass. 444, 456 (2007).

2. The District Attorney cannot disclose Criminal Offender Record Information.

To the extent that the investigatory file includes Criminal Offender Record Information, or information obtained from the Criminal Justice Information System, such disclosure is prohibited by statute. G.L. c. 6, §§ 167, 172, 178; 803 Mass. Code. Reg. 7.10.

3. The District Attorney cannot disclose records of the Office of the Chief Medical Examiner.

To the extent that the investigatory file includes information from the Office of the Chief Medical Examiner, such disclosure is prohibited by statute. G.L. c. 38, §§ 2, 7.

4. The District Attorney cannot disclose materials seized during or derived from the execution of a search warrant.

Finally, to the extent that the investigatory file includes evidence seized pursuant to a search warrant, or derived from that seizure, the District Attorney holds such evidence subject to the authority of the court that issued the search warrant and therefore cannot disclose that evidence absent a court order based upon a requisite showing. *See* G.L. c. 276, § 3. The District Attorney also is prohibited from disclosing any search warrant (and accompanying documentation) to the extent that such warrant may be subject to an order of impoundment. *E.g. Newspapers of New Eng., Inc. v. Clerk-Magistrate*, 403 Mass. 628, 631-632 (1988) (internal quotation omitted) ("It is within the discretion of a court to impound its files in a case and to deny public inspection of them, and that is often done when justice so requires.").

CONCLUSION

Accordingly, the District Attorney requests that the Court quash the March 15, 2019, summons seeking production of the District Attorney's investigatory file.

Respectfully submitted,

RACHAEL ROLLINS
DISTRICT ATTORNEY

Nicholas Brandt
Assistant District Attorney
BBO No, 670808
One Bulfinch Place
Boston, MA 02114
(617) 619-4070

April 17, 2019

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify under the pains and penalties of perjury that I have today made service on the parties by directing that a copy of this motion to quash and addendum be sent by first-class mail, postage prepaid, to:

Counsel for the Commonwealth:

Second Assistant District Attorney Sharon Thibeault
Cape & Islands District Attorney's Office
3231 Main Street
P.O. Box 455
Barnstable, MA 02630

Counsel for Keven Seme:

Edward B. Fogarty, Esq.
1380 Main Street, Suite 410
Springfield, MA 01103

Nicholas Brandt
Assistant District Attorney

April 17, 2019

ADDENDUM OF THE COMMONWEALTH

NOTICE ACCOMPANYING COURT-ORDERED SUMMONS FOR PRESUMPTIVELY PRIVILEGED RECORDS	DOCKET NO. 1572CR00128	Trial Court of Massachusetts The Superior Court
CASE NAME Commonwealth V. Keven Seme		Scott W. Nickerson, Clerk of Court Barnstable County
KEEPER OF RECORDS TO WHOM THIS NOTICE IS ISSUED AND ADDRESS Suffolk County District Attorney Suffolk County DA 1 Bulfinch Pl Boston, MA 02114		COURT NAME & ADDRESS Barnstable County Superior Court 3195 Main Street Barnstable, MA 02630

Pursuant to Rule 17(a)(2) of the Massachusetts Rules of Criminal Procedure, 378 Mass. 885 (1979), the Court has issued the enclosed summons to produce records in the above-captioned matter. A judge has determined that the records ordered produced are "presumptively privilieged," which means that they are likely to be protected by a statutory privilege.

The records ordered by the Court must be delivered to the clerk's office on or before the return date on the summons in a sealed envelope or box clearly marked as follows:

COMMONWEALTH v. Keven Seme (defendant)

DOCKET NUMBER: 1572CR00128

From: Suffolk County District Attorney
Suffolk County DA (name of keeper of records)

Date: 04/17/2019

PRIVILEGED RECORDS: IMPOUNDED

DATE ISSUED	CLERK OF COURT/ASSISTANT CLERK
03/15/2019	X

SUMMONS FOR PRESUMPTIVELY PRIVILEGED RECORDS	DOCKET NO. 1572CR00128	Trial Court of Massachusetts The Superior Court
CASE NAME: Commonwealth V. Keven Seme		Scott W. Nickerson, Clerk of Court Barnstable County
KEEPER OF RECORDS TO WHOM THIS NOTICE IS ISSUED AND ADDRESS: Suffolk County District Attorney Suffolk County DA 1 Bulfinch Pl Boston, MA 02114		COURT NAME & ADDRESS: Barnstable County Superior Court 3195 Main Street Barnstable, MA 02630

YOU ARE HEREBY ORDERED to produce the records described in the attached ORDER of the Court or as described below. The records must be delivered to the Superior Court Clerk's Office located at above Court's address on or before 04/17/2019 at 4:30 pm.

The records ordered to be produced are following:

See attached motion for requested infomation.

All records shall be produced, sealed, and clearly marked as directed in the "Notice Accompanying Court-Ordered Summons for Presumptively Privileged Record."

Failure to comply with this Summons may be deemed a contempt of court.

DATE ISSUED	CLERK OF COURT/ASSISTANT CLERK
03/15/2019	X

Date/Time Printed: 03-15-2019 13:59:27

SCR001 05/2018

Add.3
3/15/19

Superior Court
Barnstable, ss
Filed MAR 15 2019
Clerk

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, SS

SUPERIOR COURT
DOCKET NO. 1572CR00128

COMMONWEALTH

v.

KEVEN SEME
Defendant

3/15/19 Clerk to summons records returnable to this Court by 4/19/19, next hearing 4/24/19, by the Court, Cannone, J.
Asst Clerk

MOTION FOR SUMMONS SUFFOLK COUNTY DISTRICT ATTORNEY RULE 17

The defendant respectfully moves, via Mass. R. Crim. P. 17(a) for access to the RECORDS OF THE SUFFOLK COUNTY DISTRICT ATTORNEY, 1 Bulfinch Pl, Boston, MA 02114 regarding ANY NOTES OR RECORDS OF LUTHERSON J. BONHEUR, DOB 3/14/1992 AND THE DEATH/HOMICIDE ON OR ABOUT SEPTEMBER 30, 2015, OF JEFFREY RANDALL. Such records for the time period September 30, 2015 to present.

As reasons therefore, Lutherson Bonheur is a central Commonwealth witness in the case against Defendant. Upon information and belief, Mr. Bonheur was a central suspect in the homicide of Jeffrey Randall. Mr. Bonheur is also the subject of a federal indictment for drug-related crimes. Mr. Bonheur has received substantial consideration for his cooperation in the case against the Defendant. Mr. Bonheur may have received the same consideration in the investigation of the homicide of Mr. Jeffrey Randall.

1. These information sought is relevant and has evidentiary and exculpatory value.
2. The Defendant has no other means by which to obtain the documents.
3. The defendant cannot prepare for trial without the production and inspection of these files as these materials are essential to defense of who had access to the safe.
4. Failure to provide access to this evidence may tend unreasonably to delay the trial.
5. This request is made in good faith and upon reliable information.

The defendant, having met the obligations under Mass. R. Crim. P. 17(a) is entitled to a grant of the summons. Further such records are exculpatory evidence under Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) and its progeny.

Accordingly, it is requested that the defendant be given for access via summons to the INVESTIGATION RECORDS OF THE SUFFOLK COUNTY DISTRICT ATTORNEY, 1 Bulfinch Pl, Boston, MA 02114 regarding ANY NOTES OR RECORDS OF LUTHERSON J. BONHEUR, DOB 3/14/1992 AND THE DEATH/HOMICIDE ON OR ABOUT SEPTEMBER 30, 2015, OF JEFFREY RANDALL. Such records for the time period September 30, 2015 to present

THE DEFENDANT
By His/Her Attorney

Attorney Edward B. Fogarty
1380 Main Street * Ste 410
Springfield, MA. 01103
Tel: (413) 827-0174
Fax: toll free (866)843-1608
email: edward.b.fogarty@fogartylegalservices.com
BBO: 173090

CERTIFICATE OF SERVICE: I, Edward Fogarty, certify I have caused a copy of the above to be served upon all parties. /s/ Edward Fogarty

Hrones v. Keeler

Superior Court of Massachusetts, At Suffolk

April 23, 2002, Decided

00-1935

Reporter

2002 Mass. Super. LEXIS 97 *; 14 Mass. L. Rep. 427

Stephen Hrones v. Daniel Keeler

Disposition: [*1] Motion for protective order allowed.

Case Summary

Procedural Posture

The district attorney's office filed a motion for a protective order in an civil action for defamation brought by plaintiff defense attorney against defendant police officer.

Overview

The defense attorney sought to take the oral deposition of the assistant district attorney in the underlying criminal case that proceeded the civil defamation action. The court noted the case was still a live first-degree murder case, and to allow prosecutors or members of the prosecution's team to be deposed in a civil case before the criminal case was tried and finally resolved would be a gross infringement of a prosecutor's work product for trial. The court indicated the privilege of communications made to a district attorney in order to secure the enforcement of law was absolute at the very least when the underlying criminal case had not been tried or otherwise resolved. Further, the court noted the defense attorney had not exhausted his ability to get the substantial equivalent of the information being sought from other sources.

Outcome

The court allowed the motion for protective order.

Judges: Thomas E. Connolly, Justice of the Superior Court.

Opinion by: Thomas E. Connolly

Opinion

MEMORANDUM AND ORDER ON THE DISTRICT ATTORNEY'S OFFICE'S MOTION FOR A PROTECTIVE ORDER

DISCUSSION

This civil case springs out of the trial and appeal, and subsequent release of Donnell Johnson ("Mr. Johnson"). This case arose out of the murder of nine-year-old Jermaine Goffigar on October 31, 1994. The case was tried before Judge Banks and a jury. Mr. Johnson was convicted of first degree murder by deliberate premeditation and by extreme atrocity or cruelty. Stephen Hrones ("Mr. Hrones"), the plaintiff here, was the defendant's trial and appellate attorney and Assistant District Attorney Robert Tochka ("ADA Tochka") was the prosecuting attorney. During the criminal trial it was discovered that the defendant had in fact given a statement to the Boston Police and after significant effort, it was finally located on "disks," and supplied to Mr. Johnson's counsel during the trial.

Mr. Hrones argued Mr. Johnson's appeal in the Supreme Judicial Court and stated, in part, to the Court that Mr. Johnson "was basically convicted on the [*2] perjured testimony of a Boston Police Officer." [1] Evidently and allegedly, Detective

[1] Namely, that Mahoney perjured himself when he testified there was

Daniel Keeler stated to John Ellement, a reporter for the *Boston Globe*, concerning Mr. Hrones' argument to the Supreme Judicial Court that, "He's misrepresenting the truth . . . and he knows it."

Mr. Johnson's conviction was affirmed by the Supreme Judicial Court at *Commonwealth v. Kent K., A Juvenile, 427 Mass. 754, 696 N.E.2d 511 (1998)*. In the interim, based on subsequently obtained information, it was determined by the District Attorney's Office and Mr. Hrones that the defendant was not involved in the murder of Jermaine Goffigar. The conviction of Mr. Johnson was vacated and Mr. Johnson was released.

Further, in the interim, a Michael Brown and a juvenile have since been arrested and indicted for their involvement in the murder of the nine-year-old victim. The events of October 31, 1994 are still under investigation [*3] and Mr. Brown's and the juvenile's case will be tried by the Suffolk District Attorney's Office.

This is a civil action for defamation brought by the attorney for the defendant, Mr. Johnson, Mr. Hrones against Boston Police Detective Daniel Keeler for his alleged statement to John Ellement of the *Boston Globe* on May 6, 1998, as reported above. The plaintiff now wishes to take the oral deposition of ADA Tochka in this civil case. ADA Tochka handled Mr. Johnson's case through trial. This case is still a live first-degree murder case, which will come to trial against Michael Brown and a juvenile. The subject report was discussed extensively in *Kent K., A Juvenile, supra at 757-59*, where the court found that the defendant suffered no prejudice due to the discovery error (i.e. the late production of the statement). See *Kent K., A Juvenile, supra at 758-59* nn.2-5.

The key issue in deciding this Motion is as follows: the case is a live first-degree murder case, and the case will be tried. While ADA Tochka may not retry it, he was and is a key member of the District Attorney's staff. If the plaintiff is permitted to take ADA Tochka's oral deposition [*4] as a prosecutor, while the underlying case is still pending and awaiting trial, there is no doubt that such an action would impact the prosecution's preparation for trial. It should be noted that the plaintiff is not seeking any documents from ADA Tochka or from the Suffolk District Attorney's file. As such, *G.L.c. 66, § 10*, the public records statute, is not involved.

Accordingly, the question comes down to whether the rule set down in *Attorney General v. Tufts, 239 Mass. 458, 490-91 (1921)*, and in *Worthington v. Scribner, 109 Mass. 487, 488 (1872)*, and as reaffirmed in *District Attorney for Norfolk County v. Thomas J. Flatley, 419 Mass. 507, 509-11, 646 N.E.2d 127 (1995)*, is applicable to this matter. In *Attorney General v. Tufts, supra, 239 Mass. at 490-91 (1921)*, the Court stated:

> It is a principle of law founded upon sound public policy and arising out of the creation and establishment of constitutional government that communications made to a district attorney in order to secure the enforcement of law are privileged and confidential in the sense that they cannot be revealed at the instance [*5] of private parties in aid of actions at law.

In *Worthington v. Scribner, 109 Mass. 487, 488 (1872)*, the Court explained the reason for this rule as follows:

> It is the duty of every citizen to communicate to his government any information which he has of the commission of an offense against its laws. To encourage him in performing this duty without fear of consequences, the law holds such information among the secrets of state, and leaves the question how far and under what circumstance the names of informed and the channel of communications shall be suffered to be known, to the absolute discretion of the government[.]

This issue came up in *District Attorney for Norfolk*

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no report.

County v. Thomas J. Flatley, 419 Mass. 507, 646 N.E.2d 127 (1995). There a civil personal injury claim was brought against the defendant, Thomas J. Flatley, by the plaintiff who was the victim of an aggravated rape, which occurred in her apartment. The individual who perpetrated those crimes was prosecuted, convicted, and sentenced to prison. The Appeals Court affirmed judgments. See *Commonwealth v. Stande, 26 Mass.App.Ct. 1115, 529 N.E.2d 895 (1988)*. The plaintiff's [*6] claim was negligent security by Flatley on the premises owned and operated by him. Flatley's attorney subpoenaed for a deposition of the assistant district attorney who prosecuted the case, and required him to produce the contents of his files, which related to the investigation, prosecution, or trial of the case.

In discussing *Attorney General v. Tufts, supra*, and *Worthington, supra*, the Court in *District Attorney for Norfolk County, supra* at 510, stated as follows: "These two cases not only establish a broad privilege encompassing all communications made to a prosecutor for the purpose of securing law enforcement, but also make the privilege absolute. No subsequent Massachusetts decision modifies or abrogates either *Tufts* or *Worthington*."

The Court went on to discuss the public records statute and records. That issue does not pertain here. It should be noted in footnote 9 on page 513 in *District Attorney for Norfolk County, supra*, that the Court states: "Nothing in this opinion should be understood as preventing inquiry of the prosecutor either by deposition or at trial concerning statements made [*7] by the victim in the course of the district attorney's investigation and prosecution of the crime."

Such a rule, as stated in footnote 9 on page 513, would not be applicable to this case. This is a live first-degree murder case, which will be coming on for trial. To allow prosecutors or members of the prosecution's team to be deposed in a civil case before the criminal case is tried and finally resolved would be a gross infringement of a prosecutor's work product for trial. As indicated, the privilege is absolute at the very least when the underlying criminal case has not been tried or otherwise resolved. To allow otherwise, would be to create very serious problems in the trial of criminal cases by the District Attorneys. It should also be noted that footnote 9 on page 513 in *District Attorney for County* is referring to a criminal case that has been tried and affirmed on appeal. The present case is still awaiting trial.

Finally, it should be noted that the plaintiff has not exhausted his ability to get the substantial equivalent of the information being sought from other sources. The Court notes that there is the complete transcript of the underlying trial, the deposition [*8] of the defendant, Daniel Keller, taken by plaintiff on April 26, 2001, the depositions of any other witnesses, and the transcript of the hearing in Judge Banks' chambers *in which ADA Tochka explains in detail* the procedures that he followed in attempting to locate any statement, the eventual finding of said statement, and its production to defendant's counsel.

ORDER

After review of all submissions, including Impounded Exhibits # 4, # 6, and # 7, District Attorney's Office's Motion for a Protective Order is *ALLOWED*.

Thomas E. Connolly

Justice of the Superior Court

DATED: April 23, 2002

End of Document

Lafferty v. Martha's Vineyard Comm'n

Superior Court of Massachusetts, At Middlesex

April 9, 2004, Filed

033397

Reporter
2004 Mass. Super. LEXIS 107 *; 17 Mass. L. Rep. 501

Brian C. Lafferty v. Martha's Vineyard Commission

Disposition: Plaintiff's motion for summary judgment allowed in part and denied in part.

Case Summary

Procedural Posture
Plaintiff attorney brought an action against defendant commission based upon its failure to produce certain requested documents that the attorney alleged were public records. The commission contended certain documents were not public record and other documents involved privileged matters.

Overview

The attorney represented a company which sought to build housing on some property. The commission sought the advice of outside counsel in regard to the property. The attorney sent a written request to the commission for various records in its possession. The requested documents included communications between the commission and the outside counsel. The court held that records which concerned the commission's ongoing litigation or administrative proceedings were exempt from disclosure pursuant to *Mass. Gen. Laws ch. 4, § 7*, Twenty-Sixth (d). The attorney-client privilege was not an exception to the Massachusetts Public Records Law. Since the attorney would know the "requesting person" was the commission or one of its members or employees, requiring release of the advisory opinions to the attorney would have been in direct conflict with the confidentiality requirements of *Mass. Gen. Laws ch. 268B, § 3(g)*. However, there was nothing explicit or implicit in *Mass. Gen. Laws ch. 268B, §§ 3(g)* and *(4)(a)* that provided confidentiality for all correspondence between the commission and the Massachusetts Ethics Commission.

Outcome
Summary judgment was allowed in so far as records which were not related to ongoing litigation or administrative proceedings, were not related to advisory opinions, requests for advisory opinions, and preliminary inquiries or initial staff reviews. As to matters which did not pertain to ongoing litigation or administrative proceedings, the order was stayed pending a decision as to whether they were protected by the attorney-client privilege.

Judges: [*1] Raymond J. Brassard, Justice of the Superior Court.

Opinion by: Raymond J. Brassard

Opinion

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

The plaintiff, Brian C. Lafferty ("Lafferty"), brings this action against the defendant, Martha's Vineyard Commission ("MVC"), pursuant to *G.L.c. 66, § 10* ("the Public Records Law") and *G.L.c. 249, § 5*, for its alleged failure to produce copies of requested public records. Specifically, the plaintiff asks this court to order the defendant to produce certain

records in its possession. Pursuant to *Mass.R.Civ.P. 56*, the plaintiff now moves for summary judgment. For the reasons stated below, the plaintiff's motion is ALLOWED in part and DENIED in part.

Background

The undisputed material facts as established by the summary judgment record are as follows. Sometime in 1999, Down Island Golf Club, Inc. ("Down Island") submitted to the Oak Bluffs Planning Board a proposal for the development of an 18-hole golf course in Oak Bluffs on Martha's Vineyard. The Planning Board referred the proposal to MVC for review as a Development of Regional Impact ("DRI"). MVC denied Down Island's application [*2] in July 2000. On Down Island filed an appeal in Dukes County Superior Court.

Following mediation and pursuant to a remand by the Dukes County Superior Court, Down Island submitted a second application for the project to MVC. MVC denied the application in February 2002, and Down Island appealed to the Superior Court. Down Island submitted a third application for the project with MVC, but in October 2002, this too was denied. Down Island once again appealed, and all three cases are currently pending.

During this time, CKA Associates, an affiliate of Down Island, represented by Lafferty, applied for a permit under *G.L.c. 40B, § 21*, to build 376 units of housing on the same property in Oak Bluffs where the golf course had been proposed. In connection with this project, CKA Associates is the plaintiff in an action filed in Land Court on July 30, 2001. MVC intervened in that action by a motion filed on August 7, 2001. The action is now consolidated with another action pending in Dukes County Superior Court.

MVC has sought the advice of its outside counsel, Eric Wodlinger, and his firm, Choate, Hall & Stewart, over the course of these court and administrative [*3] proceedings. Matters discussed include permitting and litigation strategy, administrative and deliberative processes and policy, and mediation and settlement positions.

On January 25, 2003, Lafferty sent a written request to MVC for copies of various records in its possession dating from 1990 through 2003. Lafferty's letter included a total of 16 numbered requests which, in relevant part, consisted of the following:

4. Copies of any and all e-mails received by the Martha's Vineyard Commission or individual commission members or staff, from any party, related to Down Island Golf DRI applications between 1999 and 2002. (If these records are maintained in electronic form, please provide copies on electronic media.) ("Request No. 4.")

7. Any and all electronic and written communications between Atty. Eric Wodlinger and/or the law firm of Choat [sic], Hall & Stewart and the Martha's Vineyard Commission and/or individual staff members or commission members, from January 1998 through January 2003, including but not limited to: opinion letters, bills, invoices, routine correspondence, agreements, etc. ("Request No. 7.")

8. Any and all electronic and written communications between [*4] Attorney Ronald Rappaport and/or the law firm of Reynolds, Rappaport & Kaplan and the Martha's Vineyard Commission and/or individual staff members or commission members, from January, 1998 through January, 2003, including but not limited to: opinion letters, bills, invoices, routine correspondence, agreements, etc. ("Request No. 8.")

13. Copies of any and all correspondence between the Martha's Vineyard Commission or individual members of the commission or employees and the State Ethics Commission, including but not limited to letters of opinions, inquiries or routine correspondence. ("Request No. 13.")

Subsequent to Lafferty's request, sometime between January 31, 2003 and February 6, 2003,

Jennifer Rand, Development of Regional Impact Coordinator for MVC, performed a search of MVC's computer and paper files. Thereafter, on February 6, 2003, MVC responded to Lafferty's request; it provided estimates of copying fees for certain records and informed Lafferty that while some records would by copied for him others would not be provided to him. Specifically, MVC did not provide any records pursuant to Lafferty's Request Nos. 4, 8, and 13. MVC claimed that, pursuant to *G.L.c. 4, § 7, Twenty-sixth (a)* [*5] and the statutes and regulations governing the State Ethics Commission ("the Ethics Commission"), the records sought in Request No. 13 were exempt from the definition of "public records." Moreover, with the exception of bills and invoices, MVC did not provide records in response to Request No. 7, asserting that the records requested were protected by the attorney-client privilege and, pursuant to *G.L.c. 4, § 7, Twenty-sixth (d)*, were exempt from the definition of "public records."

On February 11, 2003, Lafferty petitioned the Supervisor of Records ("the Supervisor"), seeking a determination of whether the records requested were "public records." On June 19, 2003, the Supervisor informed MVC that it was required to disclose records described in Lafferty's January 25, 2003 letter to MVC as Request No. 7 and Request No. 13. On or about July 15, 2003, Lafferty sent MVC a check representing payment for the copying of the public records as set forth in the fee estimate provided by MVC in its February 6, 2003 response. Upon payment, MVC provided Lafferty with copies of many of the records he requested. [1] MVC has not, however, provided Lafferty [*6] with copies of certain records found in Request Nos. 7, 8 and 13. [2]

[1] At hearing on this matter, MVC's counsel stated that over 5000 documents have been provided to Lafferty.

[2] At hearing on this matter, the parties agreed that records addressed in Request No. 4 are no longer at issue because MVC has been unable to locate any such records. Moreover, MVC has agreed to supplement its initial production with additional documents, if such documents exist, in response to Request No. 8, to the extent such request seeks documents that do not relate to Ronald Rappaport's and/or the law firm of Reynolds, Rappaport & Kaplan's representation of MVC.

Discussion

Pursuant to the Public Records Law, Lafferty urges this court to compel MVC to produce documents related to communications between MVC, including its members and staff, and two attorneys as well as correspondence between MVC, including its members and staff, and the State Ethics Commission. MVC maintains that such communications are precluded from disclosure [*7] pursuant to *exemptions (a)* and *(d) under G.L.c. 4, § 7*, Twenty-sixth, the common-law attorney-client privilege, and the statutes and regulations governing the Ethics Commission.

The Public Records Law provides that a governmental entity must permit copies of records, defined as public, in its possession to be "inspected and examined by any person." *G.L.c. 66, § 10(a)*. [3] *General Laws c. 4, § 7, Twenty-sixth*, defines "public records" as:

> all books, papers, maps, photographs, recorded tapes, financial statements, statistical tabulations, or other documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee of any agency, executive office, department, board, commission, bureau, division or authority of the commonwealth, or of any political subdivision thereof, or of any authority established by the general court to serve a public purpose . . .

[*8] The Supreme Judicial Court has recognized

[3] *General Laws c. 66, § 10(a)*, in relevant part, states:

> Every person having custody of any public record, as defined in clause Twenty-sixth of section seven of chapter four, shall, at reasonable times and without unreasonable delay, permit it, or any segregable portion of a record which is an independent public record, to be inspected and examined by any person, under his supervision, and shall furnish one copy thereof upon payment of a reasonable fee.

that "public records are broadly defined and include all documentary materials made or received by an officer or employee of any corporation or public entity of the Commonwealth, unless one of [the] statutory exemptions is applicable." *Hull Mun. Lighting Plant v. Mass. Mun. Wholesale Elec. Co., 414 Mass. 609, 614, 609 N.E.2d 460 (1993)*. There are thirteen statutory exemptions from the definition of public records. The SJC has held that the "fundamental purpose" of the Public Records Law is "to ensure public access to government documents." *Gen. Elec. Co. v. Dep't of Envtl. Protection, 429 Mass. 798, 801, 711 N.E.2d 589 (1999)*. Accordingly, this court must abide by "a presumption that the record sought is public," and must place the burden upon the record custodian "to prove with specificity the exemption which applies." *Id.*, quoting *G.L.c. 66, § 10(c)*.

Lafferty Request Nos. 7 and 8: Communications with Attorneys

Lafferty argues that MVC is required, pursuant to the Public Records Law, to disclose certain communications, detailed in Request Nos. 7 and 8, between MVC, including its members and staff, and its attorneys. [*9] [4] MVC contends that these records are excluded from the requirement of disclosure pursuant to *exemption (d)*, which prohibits from disclosure, "inter-agency or intra-agency memoranda or letters relating to policy positions being developed by the agency; but this subclause shall not apply to reasonably completed factual studies or reports on which the development of such policy positions has been or may be based." *G.L.c. 4, § 7, Twenty-sixth (d)*.

As MVC maintains, many of the records requested in Request No. 7, and possibly Request No. 8, could well be records that concern ongoing litigation between MVC and other parties. [5] [*12] This court (Botsford, J.) and the administrative body governing public records have found that records concerning ongoing [*10] litigation fall within *exemption (d)*. [6] See *Kent v. Commonwealth, Civil No. 982693, 12 Mass. L. Rptr. 165, 2000 WL 1473124, at *4-5 (Mass. Super. Ct. July 27, 2000)* (Botsford, J.), citing Letter-Determination of the Supervisor of Public Records, SPR 91/039, April 19, 1991, at 3 and Letter-Determination of the Supervisor of Public Records, SPR 93/186, June 2, 1993, at 7; see also *Babets v. Sec'y of Human Servs., 403 Mass. 230, 237 n.8, 526 N.E.2d 1261 (1988)* (stating that exemption (d) protects documents from disclosure "while the deliberative process is ongoing and incomplete"). This court can see no reason to depart from such findings. [7] The preparation of and involvement in litigation by an agency, such as MVC, inherently entails the development of "policy positions" by that agency. Litigation often concerns, as does this case, a policy adopted by the agency. Further, the agency prosecutes a strategy for the litigation, and its "policy positions" are frequently subject to change and refinement throughout litigation. Accordingly,

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[4] MVC has already provided Lafferty with documents relating to bills and invoices pursuant to Request No. 7, and has agreed to do the same with respect to Request No. 8, in so far as the documents are not related to the representation of MVC.

[5] This court has neither been provided with nor reviewed any of the requested records. There is no dispute, however, that MVC is currently involved in lawsuits in which Choate, Hall & Stewart is outside counsel. See supra pp. 2-3 (discussing the lawsuits and noting that Request No. 7 seeks communications between Choate, Hall & Stewart and MVC from January 1998 through January 2003).

[6] This court recognizes that in this case the Secretary of Public Records departed from the agency's previously held position and determined that the records at issue were subject to disclosure. Importantly, although this court gives considerable deference to an administrative interpretation of a statute, it is by not controlled by such an interpretation. *Staley v. Comm'r of Public Welfare, 394 Mass. 466, 475, 476 N.E.2d 572 (1985)*.

[7] Lafferty urges this court to consider Gen. Elec. Co., where the SJC stated, "we agree with the observation that the Legislature 'clearly did not intend to exempt documents involved in litigation from the mandatory disclosure requirements of the [public records statute].'" *429 Mass. at 804*, quoting A. Cella, Administrative Law and Practice § 1182, at 584 n.10 (1986). In making this statement, however, the Court was not considering the breadth of *exemption (d)*, but rather it was addressing whether the Legislature intended to exclude records of attorney work product from the Public Records Law.

records detailed in Request Nos. 7 and 8, in so far as they concern MVC's ongoing litigation or administrative proceedings, are exempt from disclosure [*11] pursuant to *exemption (d)*. MVC also argues that, pursuant to the common-law attorney-client privilege, records detailed in Request Nos. 7 and 8 are not subject to the Public Records Law. The Supreme Judicial Court, while not directly addressing the attorney-client privilege, has found that the Public Records Law does not exempt from disclosure records which qualify as privileged attorney work product. *Gen. Elec. Co., 429 Mass. at 801*. The SJC noted, "there is no ambiguity in the statute's explicit mandate that the public have access to all government documents and records except those that fall within the scope of an express statutory exemption." *Id. at 805*. The SJC refused to imply an exemption, even one descended from common law, stating "where there is an express exception, it comprises the only limitation on the operation of the statute and no other exceptions will be implied." *Id. at 805-06*, quoting *Dist. Attorney for the Plymouth Dist. v. Selectmen of Middleborough, 395 Mass. 629, 633, 481 N.E.2d 1128 (1985)*.

Subsequent to the Gen. Elec. Co. decision, two Superior [*13] Court cases have directly addressed the issue of whether records protected by the attorney-client privilege are exempt from disclosure under the Public Records Law. In Kent, Judge Botsford concluded that the attorney-client privilege was not an exception to the Public Records Law. Specifically, she noted, "I find nothing in the General Elec. Co. opinion to suggest that the [Public Records Law] can properly be construed to include any implied exceptions, regardless of public policy concerns, of common law, or of any other consideration . . ." *Kent, 12 Mass. L. Rptr. 165, 2000 WL 1473124, at *5*. In contrast, in *Kiewit-Atkinson-Kenny v. Mass. Water Res. Auth., 15 Mass. L. Rep. 101, 103 (Mass. Super. Ct. Aug. 19, 2002)* (van Gestel, J.), Judge van Gestel determined that he would not extend the Gen. Elec. Co. decision to preclude the common-law attorney-client privilege from being an exception under the Public Records Law. In so concluding, Judge van Gestel reported the decision to the Appeals Court to answer the following question:

> Whether materials in the possession of an entity or person to which the Public Records Law, *G.L.c. 66, Sec. 10* [*14] , applies may be withheld from production solely on the basis that such materials fall within the protection of the attorney-client privilege, or are such materials not protected from disclosure under the Public Records Law unless those materials fall within the scope of an express statutory exemption?

Kiewit, 15 Mass. L. Rptr. at 103. The Appeals Court has not yet responded to Judge van Gestel's question. Therefore, this court continues to be without the guidance of a higher court in making a decision on this issue.

Without such guidance, after a close reading of Gen. Elec. Co. and an examination of the Public Records Law, this court agrees with the court's conclusion in *Kent*. Until a higher court directly addresses this issue, this court is constrained by the statutory language of *G.L.c. 4, § 7, Twenty-sixth* and the *Gen. Elec. Co.* decision. This court therefore concludes that the attorney-client privilege is not an exception to the Public Records Law. Accordingly, MVC is required to provide Lafferty with records detailed in Request Nos. 7 and 8 that are not exempted under *(d)* as discussed above. [8]

[*15] Lafferty's Request No. 13: Communications with the Ethics Commission

Lafferty argues that MVC is required, pursuant to the Public Records Law, to disclose

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[8] MVC, therefore, is required to provide records sought pursuant to Request Nos. 7 and 8 that are not related to ongoing litigation. This court, however, stays this order pending an answer from the Appeals Court on the question presented by the court in *Kiewit, 15 Mass. L. Rptr. at 103*; see infra, p. 13.

correspondence, detailed in Request No.13, between MVC, including its members and staff, and the Ethics Commission. MVC maintains that these records fall under G.L.c. 4, § 7, Twenty-sixth (a), which exempts from disclosure records that are "specifically or by necessary implication exempted from disclosure by statute." MVC cites G.L.c. 268B, §§ 3(g) and 4(a) and 930 Code Mass. Regs. § 3.01, and argues that this statutory and regulatory scheme establishes a framework of confidentiality for the requested records.

This court was unable to uncover any case law addressing whether the statutes governing the Ethics Commission provide an express or implied exemption from the Public Records Law.

Without the benefit of authority on this issue, this court must look to the language of G.L.c. 268B, §§ 3(g) and (4)(a), and the accompanying regulations, to determine whether the requested records are exempted from disclosure. [*16] General Laws c. 268B, § 3(g), in relevant part, provides:

upon written request from a person who is or may be subject to the provisions of this chapter or chapter two hundred and sixty-eight A, [the Ethics Commission shall] render advisory opinions on the requirements of said chapters . . . Such requests shall be confidential; provided, however, that the commission may publish such opinions, but the name of the requesting person and any other identifying information shall not be included in such publication unless the requesting person consents to such inclusion.

The confidentiality requirement of this statute has been interpreted in 930 Code Mass Regs. § 3.01(8), which provides that advisory opinions issued by the Ethics Commission shall be confidential, provided that the Ethics Commission may choose to publish an opinion. If such a choice is made, "the name of the requesting person and any other identifying information shall not be included unless the requesting person consents to such inclusion or publicly discloses that he has requested or received an opinion or letter from the Commission." 930 Code Mass. Regs. § 3.01(8) [*17] .

The Ethics Commission is also governed by G.L.c. 268B, § 4(a), which, in relevant part, provides:

Upon receipt of a sworn complaint signed under pains and penalties of perjury, or upon receipt of evidence which is deemed sufficient by the commission, the commission shall initiate a preliminary inquiry into any alleged violation of chapter two hundred and sixty-eight A or this chapter . . . All commission proceedings and records relating to a preliminary inquiry or initial staff review to determine whether to initiate an inquiry shall be confidential, except that the general counsel may turn over to the attorney general, the United States Attorney or a district attorney of competent jurisdiction evidence which may be used in a criminal proceeding . . .

The confidentiality language of this provision has been interpreted by 930 Code Mass. Regs. § 3.01(2), which provides, "the nature or existence of a preliminary inquiry involving allegations of violations of M.G.L. 268A or 268B, or of an initial staff review to determine whether to conduct a preliminary inquiry, shall be kept confidential by participants in those proceedings. [*18] "

This statutory and regulatory scheme does indeed set up a framework of confidentiality, as MVC argues. General Laws c. 268B, §§ 3(g) and (4)(a) mandate confidentiality on the part of the Ethics Commission and allow nondisclosure on the part of the "requesting person," in this case MVC. See 930 Code Mass. Regs. § 3.01(2), (8); see also 930 Code Mass. Regs. § 3.01(7) (providing, "nothing contained in [the] regulations shall be construed to require the subject of a preliminary inquiry or initial staff review to maintain the confidentiality of such proceedings provided, however, that should the subject make a public disclosure . . . the Commission may confirm the existence of the inquiry . . ."). As outlined in G.L.c. 268B, §§ 3(g) and (4)(a), the records which are subject to the confidentiality provisions include advisory

opinions, requests for advisory opinions, and preliminary inquires or initial staff reviews.

It is true that the Ethics Commission does have the authority to publish advisory opinions. Importantly, however, pursuant to G.L.c. 268B, § 3(g) [*19] and 930 Code Mass. Regs. § 3.01(8), the Ethics Committee is not required to publish advisory opinions; it may do so in its discretion. Moreover, the Ethics Committee may only publish such opinions after eliminating "the name of the requesting person and any other identifying information." G.L.c. 268B, § 3(g). In this case, because Lafferty is seeking copies of advisory opinions from MVC, the "requesting person," issued by the Ethics Commission, any concealment of identifying information would serve little or no purpose; Lafferty would know the "requesting person" is MVC or one of its members or employees. Thus, requiring release of these opinions to Lafferty upon demand would be in direct conflict with the intent of the Legislature in writing confidentiality requirements into G.L.c. 268B, § 3(g). See Pyle v. Sch. Comm. of S. Hadley, 423 Mass. 283, 285, 667 N.E.2d 869 (1996) (stating, "where the language of a statute is clear and unambiguous, it is conclusive as to legislative intent").

It is also important to note that the confidentiality provisions of the statute and regulations encourage agencies [*20] and public officials to seek guidance from the Commission and to cooperate with the Commission as to preliminary inquires and staff reviews. In the absence of confidentiality, agencies and public officials would be less willing to seek such guidance and to give such cooperation.

Not all records detailed in Request No. 13, however, are exempt from disclosure. As to records not specifically addressed in G.L.c. 268B, §§ 3(g) and (4)(a)-records other than those concerning advisory opinions, requests for advisory opinions, and preliminary inquiries or initial staff reviews-they must be disclosed by MVC. This court is unwilling to adopt MVC's position that all correspondence between the Ethics Commission and MVC is "specifically or by necessary implication exempted from disclosure by statute." G.L.c. 4, § 7, Twenty-sixth (a). There is nothing explicit or implicit in G.L.c. 268B, §§ 3(g) and (4)(a) that provides confidentiality for all correspondence between MVC and the Ethics Commission. See Gen. Elec. Co., 429 Mass. at 801-02 (stating that statutory exemptions in G.L.c. 4, § 7, Twenty-sixth [*21] "must be strictly and narrowly construed").

Accordingly, this court concludes that, pursuant to exemption (a), MVC is not required to disclose communications with the Ethics Commission in so far as the correspondence concerns advisory opinions, requests for advisory opinions, and preliminary inquires or initial staff reviews. All other correspondence detailed within Request No. 13 must be provided to Lafferty pursuant to the Public Records Law.

ORDER

For the reasons stated above, it is hereby ORDERED that the plaintiff's motion for summary judgment is ALLOWED, in so far as the defendant must provide the plaintiff with (1) copies of records contained in Request Nos. 7 and 8 which are not related to ongoing litigation or administrative proceedings, and (2) copies of records contained in Request No. 13 which are not related to advisory opinions, requests for advisory opinions, and preliminary inquires or initial staff reviews. As to records detailed in Request Nos. 7 and 8 which do not pertain to ongoing litigation or administrative proceedings, this court stays this order pending a decision from the Appeals Court addressing whether such documents are protected [*22] by the attorney-client privilege. See Kiewit, 15 Mass. L. Rptr. at 103. The plaintiff's motion for summary judgment is otherwise DENIED, and the remaining records are exempt from disclosure. [9]

[9] The defendant must prepare a privilege log, generically naming the

Raymond J. Brassard

Justice of the Superior Court

Dated: April 2004

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records in its possession, and if a document is withheld, the defendant must provide an explanation.